In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 73

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and E. E. STEVENSTADT, JUSTUS F. CRAEMER, HAROLD P. HUBE, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motions to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 739

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,
Appellees.

Brief in Opposition to Motions to Dismiss or Affirm

Statements in opposition to jurisdiction, and motions to dismiss or affirm, have been filed by the Public Utilities Commission of California and its individual members, the appellees above named, and also by the Cities of Los Angeles and Glendale, as "real parties in interest" to the proceedings which have led to this appeal. This brief is submitted in reply and opposition to these motions, as contemplated by Rule 7(3) of the Rules of this Court.

The arguments presented by appellees[1] in their opposing statements may properly be discussed under three headings: (1) The actual basis of the challenged order of the Commission; (2) The attempted distinction of the *Nashville case;* and (3) The statutory jurisdiction of this Court on this appeal.

1. THE ACTUAL BASIS OF THE COMMISSION'S ORDERS.

In its Jurisdictional Statement, appellant has emphasized that this Court, in its latest decision dealing with the question of the allocation of the costs of grade separations, *Nashville C. & St. L. Ry. v. Walters,* 294 U.S. 405, stated and applied the "benefit principle": i.e., that under conditions as they now exist, contributions assessed against railroads for such improvements are "constitutional only if based on benefits received by them" (294 U.S., p. 430). Appellant also pointed out that the Commission had refused to accept or follow that principle, in determining the amount to be allocated against *the appellant railroad*[2], and had declared that it was "not bound to follow the so-called 'benefits' theory" (Jurisdictional Statement, Appendix A; 51 Cal. P.U.C., p. 796).

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(1) For convenience, the Commission (and its members) and the Cities are collectively referred to herein as Appellees.

(2) In this same decision, the benefit principle was actually followed by the Commission for the limited purpose of determining whether the Highway Division of the *State Department of Public Works* should be required to contribute: i.e. the Commission cited and accepted the testimony and argument of representatives of the Department that the proposed separation would not *benefit* any state highway (51 Cal. P.U.C., p. 790), and that the total *benefits* to the nearby state highway (San Fernando Road) would be negligible (pp. 791-792), and on this basis held that the *State Department* was therefore *not involved* (p. 795), and should not contribute.

In rejecting appellant's contention for the benefit principle, the Commission in its opinion herein cited its then recent Decision No. 47344, 51 Cal. P.U.C. 771 (June 24, 1952), involving similar issues, in which it had undertaken to distinguish the *Nashville case*, and had cited a group of earlier decisions of this Court as authority for its refusal to recognize benefits. Those decisions, which had been rendered prior to this Court's recognition (294 U.S., at pp. 416, 421-423, 426-428) of the "revolutionary developments" in the transportation field, had given approval to the allocation of substantial proportions and even the entire costs of separations to the railroads, largely on the theory that such separations were essential for *safety* reasons; i.e., the protection of the public against grade-crossing *hazards* created by the railroads.

Notwithstanding this forthright position in the Commission's decision, the authors of its Statement in Opposition apparently seek to intimate to this Court that the Commission, in making the 50% allocation to appellant, has given substantial consideration to the benefits which appellant will receive; and thus to convey the impression that this case actually presents no real dispute over the benefit *principle*, but rather a mere difference of opinion as to the *methods and details* of its application to an individual case.

Thus, for example, it is asserted on behalf of the Commission (at p. 8 of the typewritten draft of the Statement in Opposition) that appellant concedes the desirability and propriety of the proposed separation, and "admits the public interest and overall benefits in which it automatically shares, but objects to the Commission's four-way allocation of costs among the beneficiaries directly involved." It is also

claimed that appellant has admitted "the elimination of" various delays (including delay to trains), but has asserted that it (appellant) cannot benefit therefrom; and that appellant has proceeded "upon a so-called benefits theory to whittle away its proportional allocation to a paltry minimum, which latter it has described to this Court as being 'a contribution against will' ".

The sum total of these attempts to minimize the substantial differences between the appellant and the Commission is almost as misleading as an outright misstatement. Appellant has conceded that the proposed separation is desirable and proper, *for the primary benefit of the motoring public* using the affected streets and roadways; but only to a relatively slight extent for appellant's benefit. Contrary to the Commission's statement, appellant has not objected *generally* to the four-way allocation of costs among the beneficiaries, but only because its own share is so much (i.e., over five times) *more* than would be proper on the basis of the Commission's own calculation of the relative benefits (Jurisdictional Statement, Appendix A; 51 Cal. P.U.C., p. 793). That calculation shows the capitalized value of appellant's benefits to be $118,340; and far from treating this sum as a contribution unwillingly exacted, appellant has stated that it does not object to making the payment as its proper share of the total cost. Appellant's specific objection is thus to the payment of $627,260 *in addition;* but even more, appellant objects to and challenges the Commission's arbitrary rejection of the benefit principle, both generally, and particularly in this case, where as a matter of record the actual benefits have been so readily and accurately determined.

The Commission's reference (at line 16-24, p. 9, of its typewritten Statement in Opposition) to the "net annual savings of $63,279", assertedly developed by its staff studies as being the measure of the benefits flowing from the separation, is so worded as to carry the apparent intendment that this entire amount represents a potential saving for the railroad (appellant). Actually, the Commission's own staff studies (of record) also show, but the Commission omits to mention, that $57,362, or about 90%, of this "net saving" represents the computed value of delays to automotive traffic on the roadway, occurring when the present grade-crossing is obstructed by the passage of trains. This figure, developed and computed on the basis of actual checks made at the crossing (see pp. 87, 88, 90 of the Appendix to Appellant's Petition to the Supreme Court of California for Writ of Review), accurately represents the actual value of the benefits which motorists (including truck and bus operators) on the roadway will receive when the separation is built. It may also be noted that this figure does not include any allowance for the benefit to the motorists from the elimination of hazards, and of costs incident to accidents at the crossing; but that omission is of slight consequence, since with the present warning devices the hazard to motor traffic is negligible.

This transparent effort to confuse this Court as to the true character and basis of the challenged decision is repeated in the body of the Commission's argument, under the heading "No Substantial Federal Question is Presented". The statement there appears that "the Commission, in apportioning the cost of constructing the instant grade separation as between the several parties directly involved,

gave due consideration to the obligations of each, *as well as to the benefits derived.* (51 Cal. P.U.C. 771, 781)."[3] The only purpose that can be ascribed to this labored attempt at confusion is that the Commission now hopes to convince this Court that, notwithstanding the express language of the challenged decision, and its reliance upon its earlier decision in the *Santa Fe case*, it has not in fact abandoned or denounced the benefit principle in this case, but on the contrary has been largely guided by benefits; so that it may in this fashion escape judicial review to determine and resolve the conflict with the *Nashville case*.

So that there may be no doubt at all as to the real basis of the challenged decision, the Court may note that in the present case the Commission has made exactly the same 50% assessment against the railroad as in the *Santa Fe case*. In its Decision No. 47344 on rehearing in that case, the Commission declared, in language quoted in part in its Opposing Statement herein but, for some reason, not identified as having been taken from that opinion (51 Cal. P.U.C., pp. 781, 782):

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise

(3) This volume and page reference is not to the principal decision challenged in the case at bar, but to the Commission's Decision No. 47344 of June 24, 1952, in the *Washington Boulevard* grade-separation matter involving the Santa Fe, now challenged before this Court in No. 667, October Term, 1952, *A. T. & S. F. Ry. Co. v. Public Utilities Commission, et al.* This reference can be taken as confirming that the Commission is here relying upon the same grounds as in that case.

of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion * * *

"While we hold that the allocation of costs herein is an exercise of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad."[4]

By affirming and repeating that ruling in the instant case, the Commission has thus treated these two companion cases as establishing a rule of law that benefits *to the railroad involved* need not be considered in allocating the costs of a grade separation. The Commission's two decisions, when read together, leave no doubt that the Commission itself regards the allocation against the appellant, here under challenge, as predicated not upon any consideration or measurement of benefits received by appellant, but solely upon its asserted authority, under the delegated police power, to make any apportionment it chooses without regard to constitutional limitations.

The confusion in which the authors of the Commission's Opposing Statement have place themselves, in their efforts to import into the Commission's decision some faint recognition of the benefit principle as contended for by appellant, is exemplified by the following excerpts from the Statement:

[1] "The Commission, in apportioning the cost of constructing the instant grade separation as between the several parties directly involved, *gave due consideration* * * * *to the benefits* derived * * * [2] By weight of

(4) Emphasis shown in quotations herein has been supplied, except as noted.

judicial decision * * * *the element of direct benefit is immaterial* * * * [3] *There is no* logical or legal *basis* for the contention *that the costs* of the Los Feliz grade separation *be borne by the parties* respectively *in accordance with the pecuniary benefits* derived by them [4] *nor are* any such *benefits mathematically calculable* * * * [5] By the great weight of judicial decision above cited, the *element of direct benefit is absolutely immaterial.* As stated by the Commission [6] *it is one of the factors for consideration* but not *necessarily* a controlling factor."

Thus, the authors of the Statement argue that the benefit principle has no logical or legal basis; that benefits are not susceptible of being mathematically calculated; that they are "absolutely immaterial"; and that notwithstanding all this, the Commission has stated that benefits are a "factor for consideration" (though not *necessarily* controlling), and here gave "due consideration to the benefits received".

Further comment upon this complex of bewilderment seems unnecessary; except that we may emphasize again that in stating the grounds for its decision, and even though it actually applied the benefit principle in order to agree with the argument advanced by the State Department of Public Works opposing any assessment *against the Department*, the Commission itself declared unmistakably, in making the allocation *against the railroad*, that it was exercising its own unfettered discretion, pursuant to the police power, and therefore "was not bound to follow the * * * benefits theory."

2. THE NASHVILLE CASE.

Both the Commission and the Cities attempted to avoid the application of this Court's decision in the *Nashville case*,

by describing it as a "single, unique and distinguishable case", which in their view should not be accepted as a guide except in cases involving grade separations in *rural areas*, upon *through inter-city* highways, and then only when these are constructed with the aid of federal funds. Appellees are at great pains, therefore, to point out that the Los Feliz separation involves an important traffic artery in the midst of the Los Angeles metropolitan area, with a population of several million, and does not involve and is not to be built with the aid of federal funds; from which it is argued that the constitutional principles stated by this Court in the *Nashville case* have no bearing.

It is quite true that in the *Nashville case* this Court directed its decision to the facts of the case then before it; and it is equally true that this is another case, involving another separation, and that certain of the factors are not the same. But the essential question for the Court's consideration here, which however appellees have conspicuously avoided in their discussion, relates to the factors in the *Nashville case* which persuaded this Court to conclude, notwithstanding the earlier decisions relied upon by the appellee in that case (and upon which the present appellees likewise strongly rely), that a new approach to the problem was required, and a new solution based upon benefits was therefore justified.

A decision of this Court, such as in the *Nashville case*, which marks a notable departure from an earlier trend of opinion, is not to be lightly dismissed as a mere aberration, or robbed of its value as a guiding statement of principle, on the theory that the factual situation there may have contained elements not present in earlier (or later) cases.

Appellant believes that the question as to the basis of this Court's conclusions in the *Nashville case*, and their applicability to the case at bar, is one which should receive the careful and reasoned study of this Court, upon full opportunity for briefs and argument by the parties.

In the approach to the study of this question, this Court should, we suggest, have in mind the following excerpt from the *Nashville* opinion, which served as an introduction to the Court's consideration of the principal issues:

> "The charge of arbitrariness is based primarily upon *the revolutionary changes incident to transportation wrought in recent years* by the wide-spread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; *the resulting depletion of rail revenues; the change in the character, the construction and the use of the highways; the change in the occasion for elimination of grade crossings*, in the purpose of such elimination, and *in the chief beneficiaries* thereof; and *the change* in *the relative responsibility of the railroads and vehicles moving on the highways as elements of danger* and causes of accidents." (294 U.S., p. 416).

All of these revolutionary changes, already well advanced at the time of the *Nashville* decision, have continued to develop and progress. The systems of through highways and "free-ways" are constantly being developed and expanded all over the United States, and particularly (as shown by this record) in the Los Angeles metropolitan area. In the latter area Los Feliz is conceded to be one of the most important arteries. The State and City highways and roadways in the Los Angeles region connect with, supplement and thus become an essential part of the national highway

system. Los Feliz is thus an inseparable and integral part of that system. The effects upon the railroads, and notably upon appellant as the railroad carrier having the largest mileage and the largest volume of traffic in California, have therefore been of the same kind as remarked by this Court in the *Nashville* case, but much more extensive and substantial. The factors recited in the Court's opinion are precisely those upon which appellant relied in the proceedings below, and now predicates this appeal. The passage of the years since the *Nashville* decision has not changed the essential reasons which, in that case, convinced this Court that an arbitrary allocation should not be sustained; instead those reasons have become much more forceful and compelling.

To indicate how completely the occasion and purpose of the Los Feliz grade-crossing elimination are the "furtherance of the uninterrupted, rapid movement of motor vehicle traffic"; and, correspondingly, that the elimination is not warranted because of accidents or any substantial hazard thereof: reference may be had to the showing made *by the Commission and the Cities* in the proceedings before the Commission.

Exhibit 2 in those proceedings was jointly prepared by representatives of the several parties *and the Commission*, and was introduced by the Commission's Chief Transportation Engineer. This exhibit showed, among other things, that in 1951 the average daily movement over the crossing was about 27,000 motor vehicles: this figure including about 1105 trucks (other than light panel trucks), and 193 buses. The exhibit also showed that the computed cost of the delays incurred by vehicles at the crossing was $57,362 per year.

Of this figure, $5,174 represented the cost of the delays incurred by trucks and buses. These figures were among those advanced and relied upon as the "economic justification of the separation."

The same exhibit also showed that in the entire period of 25 years and 3 months, January 1, 1926 to March 31, 1951, only 14 collisions between trains and highway vehicles occurred at the crossing; an average of one such accident every 21½ months. One death, and 9 non-fatal injuries, were sustained in these collisions; an average of one casualty every 30 months. The mathematical likelihood of a collision is thus less than one in 13,000,000; of a personal injury, about one in 37,000,000.

The Planning Director of the City of Glendale testified that Los Feliz is a road of great importance, connecting numerous heavily populated centers in southern California; that it also connects with many free-ways, and that numerous major traffic arteries are tributary to it; and he listed some 26 actual major roadways in this group, including U. S. Highway 99, the principal inland highway along the Pacific coast from Mexico to Canada, and U. S. 66, a major transcontinental route from southern California to St. Louis and Chicago. He also testified that Los Feliz is a very important segment of the complete highway plan for southern California; that the most densely populated areas of Los Angeles County use Los Feliz; and that delay and inconvenience to vehicular traffic at the crossing cause enormous economic loss. He referred also to interference with traffic on San Fernando Road, a nearby State Highway carrying some 40,000 vehicles per day, occasioned whenever Los Feliz is blocked and its traffic is backed up into the San Fernando intersection, 850 feet from the grade crossing.

The Principal Traffic Engineer of the City of Los Angeles testified that in the future Los Feliz will carry a great deal more traffic than at present, and even worse "tie-ups" will result unless the separation is built. He declared that Glendale will benefit from the separation principally because the blocking of Los Feliz and San Fernando Road (the State Highway), will be eliminated. Presently, he said, Los Feliz is being used up to about 50% of its potential; but with the expected population increase, the completion of various free-ways, and improvement of other roadways, the traffic on Los Feliz will be greatly increased.

Thus there is presented this situation: the highway traffic volume over the crossing has practically doubled, in a period of 25 years; a substantial percentage, both in volume and from the standpoint of ultimate benefits, consists of commercial vehicles; the roadway involved is a very important arterial connection, and a major segment of the master highway plan of the area; the proposed 6-lane grade separation is asserted to be essential, to accommodate the constantly increasing and much heavier traffic now confidently predicted; the elimination of grade-crossing collisions has not been and, on the record could not reasonably be, urged as even a subsidiary reason to justify the separation; the primary, and indeed the sole, purpose and justification are the furtherance of the uninterrupted, rapid movement of this heavy volume of motor-vehicle traffic.

The asserted factual distinctions, upon which appellees rest their argument, amount to no more than that in the *Nashville* case the grade-separation was for the purpose of promoting the free movement of motor traffic on a through highway, outside of the limits of a heavily populated metro-

politan area; whereas the Los Feliz separation, although admittedly for the same primary purposes, is located within such an area. In this case, as in that one, through inter-city commercial traffic, as well as local traffic, will use the separation, and receive substantial benefits from that use.

Note has already been taken of the Commission's statement that benefits from a grade separation are not "mathematically calculable"; the assertion being offered apparently as a further criticism of appellant's reliance upon the *Nashville* case. The Commission's own opinion and decision in the present case demonstrate the fallacy of this assertion. Actual benefits to the motoring public (and the railroad) were carefully calculated, and a statement thereof was incorporated in the co-operative exhibit above referred to. As indicated, these computations were for the purpose of showing the "economic justification" of the separation: i.e., *the monetary values of the benefits* to be derived from its construction. This showing was accepted and, apparently, relied upon by the Commission to support its conclusion that the separation was justified. In fact, the essential figures thus developed are reproduced in the text of the decision itself (51 Cal. P.U.C., p. 793). To say that benefits cannot be calculated, when in fact such calculations have been presented and used in this very case, is so transparently erroneous that further comment is not needed. We may emphasize again, however, that as mentioned in the Statement as to Jurisdiction, the benefit principle was followed by the Commission for about 16 years following its adoption, on Jan. 16, 1933 in the *Goshen Junction* case, 38 Cal. R.C. 380; and without any apparent difficulty.

The Commission, in its Opposing Statement (at p. 14), refers to the *Goshen case*, but cites also in that connection its Decision No. 25069 of August 15, 1932 (i.e., several months prior to the *Goshen case*), and says that the 1932 decision repudiated the "benefits theory". The Commission omits, however, a paragraph of the opinion in No. 25069, which followed immediately after the excerpt quoted in its Statement, as follows:

> "There can be no question that *the vehicular public will receive the greatest benefit* from the widening of these separations, so *it logically follows that this class of the public should bear the greater portion* of the cost." (37 Cal. R.C. 784, 787).

Thus it will be seen that even prior to the *Goshen case*, and in the very decision in which, as it now says, it repudiated the benefits theory, the Commission actually recognized benefits as the appropriate basis for the allocation. It continued to follow and apply that same principle, from 1933, to and including 1949.

3. THE STATUTORY JURISDICTION OF THIS COURT ON THIS APPEAL.

The Cities argue at some length that this case does not come within this Court's appellate jurisdiction; in that appellant's challenge is directed solely to that portion of the Commission's order which allocates the cost to the several parties; and, so the Cities say, that portion is judicial (rather than legislative) in character, and therefore not a "state statute" within the meaning of Section 1257(2) of Title 28, *U. S. Code*.

The argument appears to concede that the challenged order, in so far as it declares the proposed separation to be

justified, and so authorizes it to be built, is legislative in character. Thus the contention is that although the provision apportioning costs was rendered at the *same* time, by the *same* agency, as part of the *same* purported disposition of the proceeding, and under authority of the *same* statutory provisions, it was nevertheless a pronouncement applying "to a completed transaction laws which were in force at the time" (*Ross v. Oregon*, 227 U.S. 150, 163); or which had "declared and enforced liabilities as they stand on present or past facts and under laws supposed already to exist" (*Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 226); and therefore judicial in nature.

The argument of the Cities does violence to the essential distinctions between judicial and legislative action, stated in the *Prentis* opinion. There the judicial function was identified with the enforcement of liabilities predicated on present or past facts, under laws already in existence. It being conceded that the order authorizing the construction is to that extent legislative in character, the argument that in other respects the order is judicial clearly has no basis. The "fact" upon which the respective "liabilities" of the parties are to be based is the construction of the separation; clearly a *future possibility*, not a *present* or *past fact*. The "law" under which those "liabilities" are to arise—the order authorizing the construction—is not yet actually in effect, the effective date thereof having been indefinitely postponed by the Commission (Decision No. 47819, dated October 14, 1952: see the Supplemental Appendix to Appellant's Reply to the Answers of the Appellees in the Supreme Court of California).

The principal order here challenged (Decision No. 47420) is in form and intent the result of a single quasi-legislative

process: the establishment of a "new rule to be applied thereafter" to the Los Felix grade-crossing, by providing for its separation, and necessarily for the manner in which the expense of the separation shall be borne.

This Court has uniformly considered orders of State Commissions similar in general import to the challenged order to be legislative in character. In *Grand Trunk Railway Co. v. Indiana Railroad Commission*, 221 U.S. 400, the challenge was directed to an order of a State Commission requiring the installation of protective devices at a railroad grade-crossing, and apportioning the expense. No claim was made that the Commission did not have power to order the proposed construction, or that the latter was not justified by the circumstances; the sole claim was that the apportionment of the expense was invalid, as an infringement of the Contract clause (of Article I, Section 10) of the Constitution. This Court said (p. 403):

> "* * * The order is a legislative act by an instrumentality of the State exercising delegated authority (*Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226), is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution (citations) * * *"

The *Grand Trunk* decision was cited in *Lake Erie & W. R. Co. v. Public Utilities Commission of Illinois*, 249 U.S. 422. There the railroad challenged an order of the State Commission which had directed the railroad, at its own expense, to restore a side-track which had been taken up, so as to resume service to an industry. As shown by the opinion in the Court below (277 Ill. 574, 115 N.E. 519), the order had been made under a state statute, empowering the

State Commission to order industry-track connection and service, and *to apportion the expense* between the railroad and the industry concerned. The challenge was directed to both phases of the order: i.e., not only the requirement for the physical construction, but also the assumption of the expense by the railroad. This Court said (p. 424):

> "Such an order, being legislative in its nature and made by an instrumentality of the State, is a State law within the meaning of the constitution of the United States and the Laws of Congress." (citations).

Among the cases cited, following the above quotation, was *Ross v. Oregon*, supra, the only decision of this Court referred to by the Cities in connection with this subdivision of their argument. It is apparent that this Court has heretofore considered the *Ross case*, in exactly the same connection in which it is now relied upon by the Cities, and has concluded that the holding therein, if in point at all, supports a view directly contrary to the Cities' present argument.

The Commission itself apparently has no doubts as to the legislative character of the portion of the order here under challenge. In the principal decision herein (No. 47420), it said (51 Cal. P.U.C., at p. 795):

> "While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that *the authority of this Commission to allocate costs* stems primarily from Section 1202 of the Public Utilities Code and *is an exercise of the police power on the part of the State* of California through the medium of its agency, the Public Utilities Commission."

It may be noted that the Commission now affirms this expression, by quotation thereof at page 8 of its Statement Opposing Jurisdiction.

There is clearly no substantial basis in this Court's decisions for the jurisdictional objections now advanced by the Cities. But even if there were, and it should therefore be held that the appeal does not lie under Section 1257(2), the papers on appeal would be considered as a petition for certiorari, and thus the matter would be before this Court for due consideration. 28 *U. S. Code*, Section 2103.

CONCLUSION

The principal ground for appellees' motions to dismiss or affirm, and the only ground in which they actually concur, is that the *Nashville case* has no application here; that the case at bar is rather to be governed by the principles of older decisions, reflecting conditions as they existed before the "transportation revolution", following World War I, had brought about the sweeping changes recited in the *Nashville* opinion. Appellant believes that this Court's recognition, in that opinion, of the need for a new and different assessment of the relationships and obligations of rail and highway traffic, was not the mere window-dressing of a "single unique case", as appellees appear to contend, but instead a significant and controlling guide for the future.

It is respectfully submitted that the motions should be denied, and probable jurisdiction noted.

Dated: April 22, 1953

George L. Buland
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Attorneys for Appellant

Due service and receipt of a copy of the within is hereby admitted this_____ day of April, 1953.

_____

Attorney for Appellee